

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS (Boston)

3 No. 1:19-cv-12551-FDS

4
5 SINGULAR COMPUTING, LLC,
6 Plaintiff

7 vs.

8
9 GOOGLE, LLC
10 Defendant

11 *****

12
13 For Hearing Before:
14 Chief Judge F. Dennis Saylor, IV

15 Status Conference

16
17 United States District Court
18 District of Massachusetts (Boston.)
19 One Courthouse Way
20 Boston, Massachusetts 02210
21 Thursday, August 31, 2023

22 *****

23 REPORTER: RICHARD H. ROMANOW, RPR
24 Official Court Reporter
25 United States District Court
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1 P R O C E E D I N G S

2 (Begins, 12:00 p.m.)

3 THE CLERK: Singular Computing LLC versus Google,
4 LLC, Civil Action 19-12551. I just would just remind
5 you that photographing and recording and rebroadcasting
6 of this hearing is prohibited and could result in
7 sanction. Would counsel please identify themselves for
8 the record, starting with the plaintiff.

9 MR. TIMBERS: Kerry Timbers for plaintiff,
10 Singular.

11 MR. DOHERTY: Good morning, your Honor, Adam
12 Doherty also for Singular.

13 THE COURT: Good afternoon.

14 MR. VAN NEST: Good afternoon, your Honor, Bob Van
15 Nest of Keker, Van Nest & Peters for Google, and I'm
16 joined by Chris Sun from our office, Nathan Speed from
17 Wolf Greenfield, and Asim Bhansali from Kwun Bhansali.
18 We also have two of our client representatives on call
19 too, Jenn Nafish and Matt Hollender. Good afternoon.

20 THE COURT: Yes, good afternoon to all.

21 All right. This is a status conference. I have
22 pending what was Mr. Van Nest's request to postpone the
23 trial, which I'm going to deny. I'll return to that
24 topic momentarily. The various motions concerning
25 expert witnesses which are still pending and I don't

1 think we need to take up -- from my standpoint I don't
2 think we need to take up today. But we have this
3 ongoing, um, what I'll call a "supplemental discovery
4 dispute" and, um, tell me where things stand from your
5 perspective, Mr. Timbers.

6 MR. TIMBERS: Thank you, your Honor.

7 So, your Honor, we have received some new
8 information, we received information that certain
9 documents had not been collected on Monday in a letter
10 to us, and then last night at about 6:00 we received 800
11 pages of documents which we've not yet had a chance to
12 review. And at this point I think our biggest concern,
13 um, maybe a very concrete action item, is the 7800
14 documents that hit on the word "Bates."

15 We believe that already, based upon documents that
16 have recently been produced in the last 7 weeks,
17 documents that are very important, wouldn't hit on that
18 term, and we believe that the requirements of discovery
19 obligations are to have relevant documents be produced
20 even if the search term doesn't hit it. And so we would
21 ask your Honor to just have them review the documents
22 and see what is there that's relevant.

23 I am aware that in their papers Google has said
24 there's that -- you know large amounts of relevant
25 information, but that's really not the test, the test is

1 is there going to be something relevant? And we feel
2 that the proof is already in the pudding because we
3 already have documents that are very important and that
4 should be produced.

5 Our concern is and always has been not what
6 mistake was made or blame, but rather can we get some
7 assurance that relevant documents are going to be
8 produced? And just so we have a fair playing field,
9 that's true on both sides.

10 In the letter that was sent -- also you're asking
11 where are we? In the letter that we sent on Monday, um,
12 Google raised issues about our production and we are
13 looking at that. So what's good for the goose is good
14 for the gander, that's fine, um, so, um, that's the
15 issue, but what we really have in front of us is a very
16 specific request for a very specific set of documents.

17 Remember that these are limited to 11 custodians.
18 Jeff Dean is one of them. Mr. Phelps is another one.
19 And we now have these e-mails that are -- that we think
20 are very important. So that's what we'd like to focus
21 on at this point.

22 We're not in a position unfortunately to talk
23 about the 800 pages of documents that were produced last
24 night, and so what we think makes sense unfortunately is
25 to have another status conference in about a week or so

1 so that we can see where we are at that point. But we
2 would ask for a, um, the production of any relevant
3 documents that are not privileged within that group of
4 7800 documents.

5 THE COURT: All right, let me, um, put a couple of
6 questions, but let me make an observation.

7 The parties have devoted a lot of energy to
8 debating whether or not any of these documents would
9 have been produceable early on either because they were
10 part or not part of the original ESI search protocols or
11 would have been picked up by those protocols or whether
12 they're subject to automatic discovery or should have
13 been produced for some other reason. I'm not
14 particularly interested in that right now. We may get
15 there if we talk about sanctions or something down the
16 line. But right now for me the focus is on ensuring
17 that the production is complete, never mind how we got
18 from here to there. That's why at this point I am not
19 enthusiastic -- well it's one of the reasons I'm not
20 enthusiastic about ordering a 30(b)(6) deposition. I
21 just want to be assured or to ensure, um, I should say,
22 um, that all relevant documents have been, um, produced.

23 What about the depositions, is that on hold
24 pending this document production?

25 MR. TIMBERS: Yes, your Honor, exactly.

1 THE COURT: Has anything been scheduled or --

2 MR. TIMBERS: Nothing has been scheduled yet.

3 And, um, the key issue is what documents are going to be
4 produced, et cetera. So -- and hopefully it's just the
5 witnesses as we've identified. If there happened to be
6 additional witnesses, then we'd have to talk to Google
7 about that, et cetera. My guess is we would work that
8 out, all those depositions would be remote and fairly
9 short, so hopefully setting those dates will not be
10 difficult.

11 THE COURT: Okay.

12 All right, Mr. Van Nest, are you taking the lead
13 here?

14 MR. VAN NEST: I am, your Honor. And let me start
15 by thanking your Honor for allowing us to appear
16 virtually today, it makes a big difference.

17 We've had the same focus, your Honor, yes, and
18 we've been working extremely hard to try to get this
19 thing done and put it behind us. So let me give you a
20 little report.

21 As I promised on the 21st, we did produce about
22 200 documents later that day and those were in the two
23 categories that I mentioned. One category was documents
24 that we had received from the client at the beginning of
25 the case before discovery started. We've produced all

1 of those that are not privileged. The other category
2 were the so-called "last in thread," "earlier in
3 thread." Our search protocol didn't pick up sometimes
4 some errant snippets, genuinely insignificant, but part
5 of the thread, and we produced those also.

6 On Monday of this week, as Mr. Timbers mentioned,
7 we sent them a lengthy letter answering what we thought
8 they had asked about at the last hearing, providing
9 information about what we had searched and how,
10 providing information about where the documents we had
11 produced came from and all of that. We invited a meet-
12 and-confer, we invited further questions. We haven't
13 heard anything on that.

14 Yesterday we produced what I think is our final
15 supplemental production. It's only 26 documents. It
16 may be several hundred pages. But I'll tell your Honor
17 what these are. There's a few of them that are simply
18 repeat productions, duplicate productions with the data
19 -- the metadata corrected. There's a handful that were
20 in the last-in-thread, earlier-in-thread category. And
21 there's about 18 that are essentially third-party
22 produced or generated documents, they're PDFs or
23 Microsoft Office documents that are file types that we
24 typically wouldn't search because the responsiveness
25 rate is so low, but out of an abundance of caution for

1 the custodians, we searched those and produced 18 of
2 those.

3 So yesterday's production, although Mr. Timbers is
4 right, we just got it to them late afternoon, so I don't
5 want to say too much about it before they've reviewed
6 them, but in general they don't have anything to do with
7 Dr. Bates or Singular, they're third-party-produced
8 publications and articles and so on, but they now have
9 those.

10 So we have completed everything we think needs to
11 be done on the document front and as Mr. Timbers
12 mentioned we're waiting to schedule depositions for
13 Dr. Dean and Dr. Louden. Dr. Phelps is no longer a
14 Google employee, but we certainly don't object to a
15 subpoena to him, we don't control him.

16 We've tried to be extremely transparent in this
17 process. We've tried to answer questions that arose.
18 We've invited further meet-and-confer and Singular
19 hasn't taken us up on that.

20 With respect to the Bates documents, that really
21 has nothing to do with the supplemental production we're
22 talking about. I mean that -- both parties rejected
23 using terms like "Bates" or "Singular" to search
24 documents.

25 THE COURT: Again I'm not concerned about what you

1 agreed to two or three years ago, I want to talk about,
2 you know, making sure that they have everything now. So
3 --

4 MR. VAN NEST: Okay, I think they do. I think
5 they do. Because we double-checked what we did with
6 respect to the Bates documents. We faithfully applied
7 the search terms that the parties agreed to and we've
8 produced those. And since I discovered -- we discovered
9 this Dean e-mail a month ago, we had checked and double-
10 checked everything. I believe they have everything, um,
11 that we're obligated to produce. And at this point we
12 don't intend to make any further productions, your
13 Honor, unless you order us to do that. But I do not
14 think that it's productive to go back over what we did
15 before with respect to the Bates documents just because,
16 as your Honor noted last week, that might be a very
17 time-consuming task. I don't know. We haven't reopened
18 that because that really has nothing to do with the
19 supplemental production that we're making now, that's a
20 request to reopen, which I don't think is justified in
21 the circumstances.

22 So our report is we've done the document searching
23 we thought we had to do. We've complied with our
24 obligations. We're not intending to make any further
25 production. When Singular has had a chance to review

1 yesterday's set, which I don't think will take very
2 long, we're prepared to schedule Dr. Dean and Dr. Louden
3 for the supplemental depositions that were agreed to.
4 And we're cooperating on whatever subpoena they want to
5 serve on Dr. Phelps. That's our report.

6 THE COURT: So if I hear you correctly you've
7 produced 2, maybe 3, you know, waves of additional
8 documents, um, and that is a completely separate process
9 from the search Google conducted on the word "Bates"
10 that produced 7,817 results?

11 MR. VAN NEST: That's right, your Honor.

12 THE COURT: In other words, they may overlap, they
13 may not, but you don't know?

14 MR. VAN NEST: That's right.

15 THE COURT: So let me ask. We have 7800 documents
16 that have the word "Bates." It's somewhat voluminous,
17 but it's not 7.8 million documents. If I were to order
18 you to produce them all, a privilege review would have
19 to be conducted, but surely -- surely Google, of all
20 companies, ought to be able to make sure that the right
21 algorithm is in place to do a privilege screening.
22 There could be things that are irrelevant, I suppose, a
23 donation to Bates College or a joke about the Bates
24 Motel or a Bates-stamping of a document or something.
25 But, um, otherwise really how much effort is involved in

1 producing these things? If they're duplicative,
2 cumulative, so what, isn't that Mr. Timbers's problem?
3 You're just getting a dump on him, let's call it 7,000
4 documents, and it's his problem now to sort through
5 that.

6 Why is it so burdensome to Google? I'm struggling
7 to understand that. I mean I --

8 MR. VAN NEST: Your Honor --

9 THE COURT: Yes, go ahead.

10 MR. VAN NEST: I think the, um -- your Honor, I'm
11 not sure, but I can say this. With 7800 documents, I'm
12 not sure it's quite so easy as you think to screen it
13 for privilege. I am sure that of that 7800, there are
14 probably several thousand that have absolutely nothing
15 to do with the case. I understand your Honor's point
16 that that's maybe not my problem, but it could be if
17 they're confidential documents that relate to other
18 people or other third-parties or other confidential
19 activities. It's not -- I don't think that it's right
20 that I could push a button and turn those out. Some of
21 those may be completely irrelevant, as you note, but
22 they may not be jokes about the Bates Motel, they might
23 be something that's confidential to another third-party
24 or to Google. So, no, I just don't think that that
25 could be done quickly or easily.

1 I know we have to search for privilege. I know we
2 have to search to determine whether they're
3 confidential. And again I feel as though I've done
4 everything I can -- remember this started with a
5 voluntary production on our part, no one was asking, no
6 one filed a motion, no one did anything, and we produced
7 the document, and because Singular had follow-up
8 questions, et cetera, et cetera, we've done everything
9 that, you know, that they asked for or that we thought
10 was necessary. So I don't think, um, it's going to be
11 simple.

12 But I haven't asked the question your Honor just
13 asked, which is what is we were ordered to produce all
14 of that stuff? But I can tell you that I don't think we
15 could simply willy-nilly turn it over, it might impact
16 the confidential -- the confidentiality of other
17 activities within Google or other third-parties. So I
18 know we have to check that as well.

19 And again, I don't think this is a highly --
20 likely to be a highly-productive effort anyway, because
21 we've agreed on search terms and faithfully complied
22 with that and produced everything that hit the search
23 terms. And that's probably many documents within the
24 7800. But I just don't see this as a productive
25 exercise and I don't think, your Honor, that it would be

1 quick or easy.

2 THE COURT: Do you want to respond to that,
3 Mr. Timbers?

4 MR. TIMBERS: Yes, your Honor.

5 It's really a three-step process. One is are they
6 relevant? If they're not relevant, you don't have to do
7 anything else, throw them away, right?

8 THE COURT: Well you said you wanted everything?

9 MR. TIMBERS: Well we want everything that relates
10 to -- your comment about the Bates Motel is totally
11 correct. If it's not about Joe Bates or Singular, it's
12 not relevant to the case, and if that's in there, nobody
13 has to look at it. And we're talking about is this
14 productive, right?

15 So all we're asking is, is there something
16 relevant in there? If it's irrelevant, no more work is
17 needed. If it's relevant, the work is worth it because
18 it's relevant.

19 Now we can easily agree, carte blanche, at least
20 at the beginning or for good that it's all confidential
21 attorney-eyes only. We can get rid of that
22 confidentiality review. Those things inside are going
23 to be confidential. It's not a problem. And then
24 privilege review? If you're reviewing something for
25 privilege, you've already decided it's relevant. So I

1 think it's important to split this up into "I'm culling
2 to separate the wheat from the chaff," as we always do,
3 but when you've got the wheat, then the rest of it is
4 done and is appropriate.

5 So that's -- that's, um -- we don't know what's in
6 there but we do know that some very important documents
7 hit on the word "Bates," so we know there's overlap.
8 The Jeff Dean e-mail mentions "Bates" and so -- and his
9 forward to Phelps mentions "Bates." So we know that
10 there's overlap. So it's not a fishing expedition, it's
11 likely -- very likely there's important stuff there.
12 But importance isn't the test.

13 MR. VAN NEST: Your Honor, if I could respond to
14 that?

15 THE COURT: Yes.

16 MR. VAN NEST: Number 1, I won't bother the Court
17 with this point much, but the documents that have been
18 produced don't change a thing in terms of a case
19 narrative or the evidence, that's for sure. But we
20 already did what Mr. Timbers just suggested we do. In
21 other words, if the point is what's in here that's
22 relevant? We already, in conjunction with the
23 plaintiffs, did search these 7800 using search terms
24 somewhat narrower than "Bates" and "Singular," not a
25 lot, and produced everything that wasn't privileged

1 within that set. So if the task is to produce what's
2 relevant, unless you're going to review every single one
3 of the 7800 documents, which I don't think anyone is
4 suggesting we do, you're going to run search terms
5 against them, and we did that in agreement with the
6 plaintiff and produced what was generated by that. It
7 would be doing the same thing again. But we already
8 know we did that and we did it correctly. And so I'm
9 not sure really what is -- what is being requested. I
10 thought your Honor was suggesting we just dump the whole
11 7800 on them after doing a privilege review and I don't
12 think that's practical.

13 And if what Mr. Timbers is saying, and I think he
14 is, all we want is anything relevant out of there, well
15 I think he has that already. But the way you would
16 determine it is applying a search term in addition to
17 "Bates" or "Singular," which we already agreed on and
18 did.

19 MR. TIMBERS: You'd have to --

20 THE COURT: All right, here's what I'm going to
21 do. I'm going to -- I would like assurances that there
22 isn't anything in those 7800 documents, um, and I think
23 the sensible thing to do is they have been searched
24 according to the search terms that were developed at the
25 beginning, maybe those were too narrow or were not

1 properly framed, who knows. But I want you to meet and
2 confer and see if you can agree on some reasonable set
3 of search terms that would ensure there isn't anything
4 in there that didn't get picked up on the first serve.
5 And when I say "reasonable," I mean "Joe Joseph Bates,"
6 "Bates Singular," "LPDHR," if I'm remembering the
7 acronym correctly, you know whatever it is. Just some
8 reasonable subset, it may not be perfect, but it would
9 have -- let's call it a 99 percent probability that if
10 there was a relevant document in there, it would be
11 picked up. And, um, I think that's an exercise worth
12 doing. That presumably would narrow this considerably
13 and I think that's worthwhile.

14 And never mind what you agreed upon before, there
15 obviously was some imperfection in it. Why don't you
16 see if you can't do that and see what that number looks
17 like and then we can take it from there. If it's 25
18 documents, it's not a big deal. If it's 16, you've only
19 eliminated one document and maybe we need a different
20 plan. But I don't know.

21 MR. VAN NEST: Thank you, your Honor, that's a
22 good point. We can carry that out. Thank you.

23 THE COURT: All right.

24 In the meantime, um, Mr. Timbers, enjoy your Labor
25 Day weekend reviewing all these documents and why don't

1 yes reconvene in a week or 10 days and see where we are.

2 MR. TIMBERS: Thank you, your Honor.

3 THE COURT: Before I forget the point, let me
4 return to the point of why I'm not postponing the trial.
5 The trial was originally set for September 11th. I
6 swore in blood and on my mother's grave that I was not
7 going to postpone it, I relented and granted a 4-month
8 continuance.

9 I recognize the work that goes into trying a
10 complex case, I myself did it for many years, um, as
11 lead counsel as well as more junior roles in the early
12 part of my career. I recognize the human cost that goes
13 into all of this. As an aside, my experience, a lot of
14 that is not really necessary and merely derives from the
15 insecurity of counsel really more than legitimate needs,
16 so putting that aside, I do recognize the human cost
17 that any capable lawyer is going to, um, pay to get
18 really any case ready for trial, but particularly a
19 complex one. And for what's it's worth, I don't think
20 there's any judge in the United States that's more
21 sympathetic to, um, trying to avoid the demands on
22 people's personal lives and respecting vacations and,
23 um, family needs and all of that.

24 Having said all of that, the fact is I gave you 4
25 extra months, not 4 fewer months. It still, um, permits

1 6 or 7 days for final logistics before the trial starts.
2 Even if people take time off for Christmas and New
3 Year's, um, there's a lot of work that can be done now.
4 There's a lot of lawyers involved in this case. I know
5 it's not as simple as that, but lead counsel needs to
6 have a finger, if not a whole hand, wrist, and arm in
7 every pie, but still I gave you 4 extra months. And I
8 think under the circumstances you all can get it done
9 without, um, making all of the people junior to you
10 miserable. And so January 8th it is, it fits best with
11 my schedule, and we impanel in this court on Mondays
12 typically.

13 I suppose I should add there that sometimes some
14 -- if we do have a lot of impanelments on one day,
15 sometimes things are bumped to Tuesday because of the
16 complexity of impanelment. Typically civil cases are
17 not bumped, but it's at least a possibility that somehow
18 we'd wind up impaneling the next day, but I don't know
19 that yet and won't for sometime.

20 So January 8th it is. And, um, I recognize and
21 respect what you're doing and hope you have a good
22 holiday, not just Christmas and New Year's, but the one
23 coming up.

24 And, um, let's reconvene, Matt, um -- at about
25 September 11th?

1 THE CLERK: September 11th at 12:00.

2 THE COURT: September 11th at 12:00 Eastern time,
3 does that work for everyone?

4 MR. TIMBERS: Yes, your Honor.

5 MR. VAN NEST: That works fine, your Honor. The
6 11th, a week from Monday, at noon in Boston.

7 THE COURT: Noon Eastern time, okay, and we'll see
8 where we are at that point.

9 And again, if you haven't figured this out, I'm
10 holding off, I'm reluctant on the Rule 30(b)(6) motion,
11 it seems to me that that would, um -- there's nothing to
12 be gained there, very little to be gained there in terms
13 of, um, producing additional documents I think, it's
14 more, um, directed to how Google complied with its
15 discovery obligations. I would be surprised if the
16 process of searching, collecting, and producing
17 responsive documents was not undertaken by lawyers,
18 there are at best complex issues of privilege and work
19 product and, um, it's not obvious to me that that is
20 worth the candle. But again I'm holding off on that
21 until, um, until I'm confident, reasonably confident
22 that, um, the discovery process has been completed and
23 we'll see where we are.

24 All right?

25 MR. VAN NEST: Your Honor, I just have one

1 question.

2 THE COURT: Yes.

3 MR. VAN NEST: And that is we agreed, your Honor
4 entered a pretrial filing scheduled last time, but we
5 don't yet have replacement dates for the pretrial
6 conferences. We had a couple set when we had our
7 September trial.

8 THE COURT: Okay.

9 MR. VAN NEST: I'm not asking for any today, but
10 I'm just reminding the Court that we need a day or two
11 on that.

12 THE COURT: All right, let me talk to the Clerk
13 about that. I like, I'm a fan of pretrial management.
14 I'm sure you all have tried cases, particularly in state
15 court, where there's no pretrial management at all, and
16 it's bad. Okay?

17 MR. VAN NEST: We agree.

18 THE COURT: Okay. Thank you all.

19 (Ends, 12:30 p.m.)
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C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER, do hereby certify that the forgoing transcript of the record is a true and accurate transcription of my stenographic notes, before Chief Judge F. Dennis Saylor, IV, on Thursday, August 31, 2023, to the best of my skill and ability.

/s/ Richard H. Romanow 09-05-23

RICHARD H. ROMANOW Date